No. 8857.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

JENNIE R. BUCKLEY,

Bankrupt.

BAKERSFIELD ABSTRACT COMPANY,

Appellant,

vs.

JENNIE R. BUCKLEY,

Appellee,

and

WILLIAM H. CLENDENEN,

Appellant,

vs.

JENNIE R. BUCKLEY,

Appellee.

CLOSING BRIEF OF APPELLANT BAKERSFIELD ABSTRACT COMPANY.

AND

CLOSING BRIEF OF APPELLANT WILLIAM H. CLENDENEN.

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In appellee's additional statement of case appears the first reference to an oral order of the Referee [Tr. p. 27, commencing at line 3] enjoining the creditors from proceeding against the bankrupt. The record does not show [Tr. p. 6] that appellee has claimed or alleged any violation of an oral order made at the meeting at which the debtor offered an extension and composition proposal. [Tr. pp. 26-27.]

This oral order is not the temporary restraining order which appellant is said to have violated. The petition for order to show cause [Tr. p. 6] filed by appellee with the Referee, alleges that the restraining order which was violated, was part of the order of adjudication of bankruptcy and was made on December 13, 1937. This latter order was the order found by the Referee to have been violated. [Tr. pp. 41-43.]

Appellee argues that the restraining order issued by the Referee was issued in compliance with the ruling set forth in *Hardt v. Kirkpatrick,* 91 Fed. (2d) 875, 879, but does not attempt to show that the order was of the kind provided for by Sec. 75, Subd. S of the Bankruptcy Act. The temporary order, made on December 13, 1937, was not issued in compliance with the procedure suggested by this Court in *Hardt v. Kirkpatrick, supra.* Appellant pointed out in its opening brief that the restraining order was not one of the kind provided for in Section 75, Subdivision (S) of the Bankruptcy Act (11 U. S. C. A. 203) and discussed in *Hardt v. Kirkpatrick, supra.* The progress of appellee's bankruptcy proceeding had not reached a point where the stay order provided for in the Act could properly issue. However, as pointed out in appellant's opening brief, it would have been proper and feasible for the Court to issue a temporary restraining order pending the arrival of the time when the statutory stay of proceedings could be effected. Such a temporary restraining order would hold the estate intact, until the appraisals and the setting aside of the unencumbered exemptions could be accomplished in the course of administration, but such a temporary order should not be used as a substitute for the stay order, expressly provided for by the Bankruptcy Act. (Sec. 75, Subd. (S), Subsec. 2.)

Appellee refers (Br. p. 4, lines 17-20) to notice had by the appellant William H. Clendenen of the Referee's oral statement as to an impending restraining order and (Br. p. 5, lines 7-15) to notice imputed to the appellant Bakersfield Abstract Company, because of notice had by the appellant William H. Clendenen. Appellee should not adopt as a basis for argument an oral restraining order [Tr. p. 27, lines 3-6], or an oral notice of an impending restraining order, inasmuch as the proceedings before the Referee arose out of the alleged violation of the restraining order issued by a judge of the District Court on December 13, 1937. Appellant believes that this shift by appellee makes appellee's contentions inapplicable to the facts disclosed in the record and appellant's opening brief.

The Appellant, Bakersfield Abstract Company, Does Have an Interest in This Appeal.

Appellee states (Br. p. 6, lines 1-2) that the appellant, Bakersfield Abstract Company, has no interest in the property except by virtue of the deed of trust. The record is silent on that point and the statement should not prejudice that appellant. However, if that statement is to be accorded consideration, appellant, Bakersfield Abstract Company, excepts to the statement and refers to the fact that as a trustee under a deed of trust and having carried out its functions as such, to the extent disclosed by the record [Tr. pp. 10-13], it has acquired an interest provided for by the terms of the deed of trust. It is well known that deeds of trust secure not only the payment of the fees of the trustee, but also the repayment of any expenses and advances incurred or made by the trustee pursuant to the provisions of the instrument. Legal and contractual duties, obligations and liabilities are imposed

upon trustees under deeds of trust by the provisions of such deeds and by law. The fact that the record shows that the services of the trustee under the deed of trust have been rendered and that a trustee's deed was issued [Tr. pp. 10-13] indicates the substantial interest of the trustee and ample reason for it to urge the effectiveness of its acts.

It is submitted that the propositions stated in the opening brief represent the law applicable to the order of the referee and that appellee has not set forth sufficient reasons to justify a departure from the orderly procedure required in the exercise of the judicial power of restraint and injunction.

Appellee has failed to support the validity of the order of the referee, or to effectively meet the propositions urged in appellant's opening brief. The order of the referee is erroneous and should be set aside.

Respectfully submitted,

Wm. H. B. Haymond,

Counsel for Appellant Bakersfield Abstract Company.

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An order was made by this court on the 26th day of October, 1938, permitting the appellant William H. Clendenen and the appellant Bakersfield Abstract Company to file a consolidated closing brief. Pursuant to such order the appellant William H. Clendenen adopts on his behalf the closing brief of the appellant Bakersfield Abstract Company and the arguments therein set forth.

Respectfully submitted,

OSBORN & BURUM,
By ROY BURUM,
Counsel for Appellant William H. Clendenen.